SUPREME COURT, U. S.
FILED
JUL 20
MICHAEL RODAK

IN THE

# Supreme Court of the United States

**OCTOBER TERM, 1973**

No. 73-2055

SECURITIES INVESTOR PROTECTION CORPORATION,
*Petitioner,*

*v.*

JAMES C. BARBOUR, AS RECEIVER FOR GUARANTY BOND AND SECURITIES CORPORATION AND GUARANTY BOND COMPANY, INC.,
*Respondent,*

and

SECURITIES AND EXCHANGE COMMISSION,
*Respondent.*

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

THEODORE H. FOCHT
*General Counsel*
Securities Investor Protection Corporation
900 Seventeenth Street, N.W.
Washington, D.C. 20006
*Attorney for Petitioner*

*Of Counsel:*

WILFRED R. CARON
*Associate General Counsel*

KEVIN H. BELL

# INDEX


| | PAGE |
|---|---|
| Opinions Below | 1 |
| Jurisdiction | 1 |
| Questions Presented | 2 |
| Constitutional and Statutory Provisions Involved | 3 |
| Statement of the Case | 5 |
| Prior Critical Proceedings | 5 |
| Receiver's Enforcement Proceeding | 6 |
| District Court's Opinion | 7 |
| Court of Appeals' Opinion | 8 |
| Summary of the Act | 9 |
| Reasons for Granting the Writ | 13 |
| I—The Proper Construction of Section 7(b) of the Act is an Important Novel Federal Question Which Should be Settled by this Court and Which the Court of Appeals Decided in a Way in Conflict With Controlling Principles Established by Decisions of this Court | 13 |
| A. Section 7(b) is Critically Important to the Proper Implementation of the Act, to the Securities Industry, and to the Commission's Responsibility to Enforce the Federal Securities Laws | 13 |
| B. The Court of Appeals Seriously Misconstrued Section 7(b) by Failing to Apply Principles of Construction Firmly Established by this Court | 16 |

PAGE

II—The Court of Appeals' Summary Rejection of SIPC's Defenses Based Upon the Impossibility of Fulfilling the Act's Purposes as a Result of the Receivership Raises Questions of Critical Importance to SIPC's Authority and the Proper Implementation of the Act ..... 20

III—The Exercise of *In Personam* Jurisdiction Over SIPC Raises an Important Question of Due Process of Law Which the Court of Appeals Decided in a Way in Conflict With Controlling Decisions of this Court ..... 24

Conclusion ..... 26

Appendix

**Table of Cases**

*Association of Data Processing Service Organizations, Inc.* v. *Camp*, 397 U.S. 150 (1970) ..... 9

*Ash* v. *Cort*, 496 F.2d 416 (3d Cir. 1974), *petition for cert. filed*, 42 U.S.L.W. 3703 (U.S. June 20, 1974) (73-1908) ..... 16

*Bass Anglers Sportsman's Soc.* v. *U.S. Plywood-Champion Papers, Inc.*, 324 F. Supp. 302 (S.D. Tex. 1971) ..... 16

*Bass Anglers Sportsman's Soc.* v. *U.S. Steel Corp.*, 324 F. Supp. 412 (S.D., M.D. & N.D. Ala.), *aff'd*, 447 F. 2d 1304 (5th Cir. 1971) ..... 16

*Bohart-McCaslin Ventures, Inc.* v. *Midwestern Securities Corp.*, 352 F. Supp. 937 (N.D. Tex. 1973) ....8, 13, 20

*Botany Worsted Mills* v. *United States*, 278 U.S. 282 (1929) ..... 16

*J. I. Case* v. *Borak*, 377 U.S. 426 (1964) ..... 17

*Connecticut Action Now, Inc.* v. *Roberts Plating Co., Inc.*, 457 F. 2d 81 (2d Cir. 1972) ..... 16

*Continental Cas. Co.* v. *United States*, 314 U.S. 527 (1942) ..... 17

PAGE

*Ginsberg & Sons* v. *Popkin*, 285 U.S. 204 (1932) ..... 17

*Hanson* v. *Denckla*, 357 U.S. 235 (1958) ..... 24, 25

*Holloway* v. *Bristol-Myers Corp.*, 485 F. 2d 986 (D.C. Cir. 1973) ..... 16

*Alan F. Hughes, Inc.* v. *Securities & Exchange Commission*, 414 U.S. 1092 (1973) ..... 9

*International Shoe Co.* v. *State of Washington*, 326 U.S. 310 (1945) ..... 7, 24, 25

*Jacklovich* v. *Interlake, Inc.*, 458 F. 2d 923 (7th Cir. 1972) ..... 16

*Landy* v. *Federal Deposit Insurance Corporation*, 486 F. 2d 139 (3rd Cir. 1973), *cert. denied*, 94 S. Ct. 1979 (1974) ..... 22

*Massachusetts Trustees of Eastern Gas & Fuel Associates* v. *United States*, 312 F. 2d 214 (1st Cir. 1963) 17

*McGee* v. *International Life Insurance Co.*, 355 U.S. 220 (1957) ..... 7, 24

*Nat'l R.R. Passenger Corp.* v. *Nat'l Ass'n of R.R. Passengers*, 414 U.S. 453 (1974) ..... 16, 17, 18, 20

*Perry* v. *Commerce Loan Co.*, 383 U.S. 392 (1966) ..... 22

*SEC* v. *Long Island Lighting Co.*, 148 F. 2d 252 (2d Cir. 1945) ..... 17

*Seligsohn* v. *Securities & Exchange Commission*, 414 U.S. 1111 (1973) ..... 9

*Service Life Insurance Company* v. *United States*, 293 F. 2d 72 (8th Cir. 1961) ..... 17

*Sierra Club* v. *Morton*, 405 U.S. 727 (1971) ..... 9

*Switchmen's Union of North America* v. *Nat'l Mediation Board*, 320 U.S. 297 (1943) ..... 16, 18

*United States* v. *Constantine*, 296 U.S. 287 (1935) ..... 13

*United States* v. *Giordano*, 469 F. 2d 522 (4th Cir. 1972), *aff'd*, 94 S. Ct. 1820 (1974) ..... 17

*United States* v. *Sisson*, 399 U.S. 267 (1970) ..... 22

**Statutes**


| | PAGE |
|---|---|
| Securities Investors Protection Act of 1970 (15 U.S.C.) | |
| § 78aaa *et seq.* | 2 |
| §§ 78ccc(a) and (b)(1) | 3, 11, 18 |
| § 78ccc(c) | 11 |
| § 78ccc(a)(2) | 11 |
| § 78ccc(b)(1) | 16 |
| § 78ccc(e)(2)-(3) | 11 |
| § 78ddd | 11 |
| § 78ddd(a)-(d) | 3 |
| § 78ddd(c) | 4, 11 |
| § 78ddd(d)(2)(B) | 11 |
| § 78ddd(e)(1) | 11 |
| § 78ddd(f)-(g) | 11 |
| § 78eee | 3 |
| § 78eee(a)(1) | 3, 12, 18 |
| § 78eee(a)(2) | 3, 4, 12 |
| § 78eee(a)(3)(A) | 13 |
| § 78eee(b)(1)(B) | 13 |
| § 78eee(b)(3) | 13 |
| § 78eee(c) | 13 |
| § 78fff(c)(1) | 13 |
| § 78fff(c)(2)(C)(iii) | 11 |
| §§78fff(d)(1) and (2) | 11 |
| § 78ggg(b) | 2, 3, 4, 13, 14, 16, 18, 19, 20 |
| § 78ggg(c)(2) | 11 |
| § 78ggg(d) | 10 |
| §§ 78iii(a) and (c) | 3, 4 |
| § 78iii(e) | 10 |

PAGE

§ 78iii(f) ..... 10

§ 78kkk(b) ..... 11

§§ 78*lll*(1) and (3) ..... 3, 10

TENN. CODE ANN. § 20-235 ..... 4, 7, 24

28 U.S.C. § 1254(1) ..... 1

45 U.S.C. § 541 ..... 17

UNITED STATES CONST., amend. V ..... 4

**Other Authorities**

Duffy, "Reforming SIPC", 7 THE REV. OF SEC. LEG. 985 (1974) ..... 13

Hearings on H.R. 13308, H.R. 17585, H.R. 18081, H.R. 18109, H.R. 18458 Before the Subcomm. on Commerce and Finance of the House Comm. on Interstate and Foreign Commerce, 91st Cong., 2d Sess. 199 *et. seq.*, 365 ..... 10, 11, 12, 19

H.R. REP. No. 91-1613, 91st Cong., 2d Sess. 1 (1970) ..... 10, 11, 19, 21

Hearings on S. 2348, S. 3988, S. 3989 Before the Subcomm. on Securities of the Senate Comm. on Banking and Currency, 91st Cong., 2d Sess. 231-233, 271-272 (1970) ..... 10, 11, 12, 19, 21

S. REP. No. 91-1218, 91st Cong., 2d Sess. 4 (1970) ..... 10, 12, 19

Securities and Exchange Commission Rule 15c3-1 ..... 5

IN THE

# Supreme Court of the United States

**OCTOBER TERM, 1973**

No.

SECURITIES INVESTOR PROTECTION CORPORATION,
*Petitioner,*

*v.*

JAMES C. BARBOUR, AS RECEIVER FOR GUARANTY BOND AND SECURITIES CORPORATION AND GUARANTY BOND COMPANY, INC.,
*Respondent,*

and

SECURITIES AND EXCHANGE COMMISSION,
*Respondent,*

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Petitioner Securities Investor Protection Corporation respectfully prays that a writ of certiorari issue to review the opinion and judgment of the Court of Appeals for the Sixth Circuit entered on April 23, 1974.

### Opinions Below

The opinion of the Court of Appeals, reported at 496 F.2d 145 (6th Cir. 1974), is printed as Appendix A hereto. The unreported opinion of the District Court is printed as Appendix C hereto.

### Jurisdiction

The judgment of the Court of Appeals was entered on April 23, 1974 (Appendix B hereto). By agreement of the parties, with the District Court's concurrence, no further proceedings will be taken pursuant to the mandate until this petition is determined. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

## Questions Presented

The Securities Investor Protection Act of 1970 ("Act") became effective December 30, 1970 ("Effective Date").[1] In part it created the Securities Investor Protection Corporation ("SIPC"), a non-profit membership corporation consisting of most broker-dealers ("Members"). The Act requires Members to pay assessments to SIPC. It also gives limited protection from SIPC's funds to Members' customers in the course of a liquidation proceeding which SIPC may commence against Members in appropriate cases (*e.g.* insolvency). The questions presented are:

1. Whether customers of a Member[2] have an implied private right of action to compel SIPC to meet its alleged obligations to them under the Act, despite Section 7(b) thereof which grants that right only to the Securities and Exchange Commission ("Commission")?

2. If such a right of action can be implied, whether a receiver of a Member has standing to maintain it?[3]

3. Whether SIPC can be compelled to initiate a liquidation proceeding under the Act where the broker-dealer has already been substantially liquidated in a receivership which involved several affiliated enterprises (not broker-dealers); where it is no longer possible to implement the Act substantially as Congress intended; where there is no demonstration that customers will ultimately suffer any loss; and where any possible loss would result from the imposition upon customers of some of the receivership expenses.

4. Whether the United States Constitution and the Tennessee long-arm statute permit *in personam* juris-

1. 15 U.S.C. § 78aaa *et seq.*

2. Whether the broker-dealer involved here was a member is also an issue.

3. This question and those designated as number 5 are not discussed as Reasons For Granting the Writ. They are stated to preserve them if this petition is granted.

diction over SIPC by the mailing of process to its offices in Washington, D.C., solely because the Act exacts assessments from Tennessee broker-dealers and protects Tennessee residents, without any proof that SIPC has any place of business or is actually engaged in activities in Tennessee.

5. Whether a broker-dealer which, prior to the Act's Effective Date, was hopelessly insolvent and subject to the Commission's injunction action based on federal securities laws violations, is covered by the provisions of the Act if it engaged (although unlawfully) in securities transactions between the Effective Date and a few days subsequent when an injunction issued? If so, whether SIPC was denied due process when the Court of Appeals held the Act applies without affording SIPC an evidentiary hearing in the District Court upon its pleaded denial of such transaction of business.

## Constitutional and Statutory Provisions Involved

Because of their length the following provisions of the Act which are involved are set forth in Appendix D hereto: Sections 3(a) and (b)(1), 4(a)-(d), 5, 6, 7(b), 9(a) and (c), and 12(1) and (3).[4] However, excerpts or summaries of some principal provisions are set forth below to facilitate the review of this petition.

> "NOTICE TO SIPC.—If the Commission or any self-regulatory organization is aware of facts which lead it to believe that any broker or dealer subject to its regulation is in or is approaching financial difficulty, it shall immediately notify SIPC, and, if such notification is by a self-regulatory organization, the Commission." Section 5(a)(1)
>
> "ACTION BY SIPC.—If SIPC determines that any member has failed or is in danger of failing to meet its obligations to customers and that there exists one or more of the conditions specified in subsection

4. 15 U.S.C. §§ 78ccc(a) and (b)(1), 78ddd(a)-(d), 78eee, 78fff, 78ggg(b), 78iii(a) and (c), and 78*lll*(1) and(3).

(b)(1)(A) of this section, SIPC . . . may apply . . . for a decree adjudicating that customers of such member are in need of the protection provided by this chapter." Section 5(a)(2)

LIQUIDATION PROCEEDINGS.—Section 6 provides that a proceeding commenced by SIPC is a liquidation proceeding. It states the purposes of the proceeding and in great detail sets forth the powers and duties of the liquidating trustee, the extent to which the Bankruptcy Act applies, SIPC's obligations and rights of subrogation and recoupment, monetary limits upon the protection available to customers from SIPC's funds, definitions of persons entitled and not entitled to that protection, and numerous other procedural and substantive provisions.

"ENFORCEMENT OF ACTIONS.—In the event of the refusal of SIPC to commit its funds or otherwise to act for the protection of customers of any member of SIPC, the Commission may apply to the district court of the United States in which the principal office of SIPC is located for an order requiring SIPC to discharge its obligations under this chapter and for such other relief as the Court may deem appropriate to carry out the purposes of this chapter." Section 7(b)

"GENERAL ASSESSMENT AUTHORITY.—SIPC shall . . impose upon its members such assessments as . . . SIPC may deem necessary and appropriate. . ." Section 4(c)(2)

"COLLECTING AGENT.—Each self-regulatory organization shall act as collection agent for SIPC to collect the assessments . . . and members of SIPC who are not members of any self-regulatory organization shall make payment direct to SIPC." Section 9(a)

Also involved are the Tennessee long-arm statute (TENN. CODE ANN. § 20-235), and the due process clause of the Fifth Amendment to the United States Constitution. U. S. CONST. amend. V. These are set forth in Appendix E hereto.

## Statement of the Case

### Prior Critical Proceedings

Guaranty Bond and Securities Corporation ("Guaranty Bond") was registered with the Commission as a broker-dealer on the Act's Effective Date. Prior thereto the Commission had commenced an injunction action in the District Court, Middle District of Tennessee, against Guaranty Bond, its principals, and its parent Guaranty Bond Company, Inc. ("Parent"). The Commission's allegations included Guaranty Bond's longstanding violations of the Commission's Rule 15c3-1 ("Net Capital Rule").[5] On January 6, 1971 the District Court granted a preliminary injunction, and on January 27, 1971 it appointed James C. Barbour as Receiver for Guaranty Bond and its Parent.

*Guaranty Bond's 1970 Insolvency.* Guaranty Bond's hopeless insolvency and substantial violations of the Net Capital Rule before the Act's Effective Date are adjudicated and uncontrovertible facts.

*The Receivership.* Subsequent orders of the District Court establish among other things that by the end of May 1971, when SIPC first learned of the Guaranty Bond situation, the receivership had been expanded to include various other enterprises (not broker-dealers) affiliated with Guaranty Bond and its Parent;[6] the Receiver's liquidation of Guaranty Bond and affiliates was substantially completed; the insurance business of one affiliate had been sold off to the wife of one of Guaranty Bond's principals; and all securities (more than 15 million dollars worth) had been returned to their owners.

---

5. The Commission had calculated that as of September 30, 1970 Guaranty Bond had a net capital deficit of almost 3½ million dollars.

6. General Insurance Underwriters, Inc. (a division of Guaranty Bond's Parent), Church Building Associates, Inc., Religious Institutional Finance Corporation of America, and two partnerships of Guaranty Bond's principals known as Huey & Huey, and Huey Brothers Joint Tenants. Guaranty Bond's principal business was arranging financing for church construction via underwritings of church bonds.

*Liability of Principals.* The District Court made extensive findings of fraudulent, dishonest and manipulative conduct by Guaranty Bond's principals and cited their admissions of siphoning earnings from Guaranty Bond to its Parent and wrongfully taking secret profits. To date the Receiver has taken no action against them.

*SIPC's Decision Not To Intervene.* SIPC first learned of the Guaranty Bond situation when it received a letter dated May 27, 1971 from the Receiver's counsel requesting "protection under the Act".[7] SIPC declined to intervene because of the status, scope and progress of the receivership, and because both Guaranty Bond's hopeless insolvency and the Commission's action occurred before the Act's Effective Date.

**Receiver's Enforcement Proceeding**

The Receiver's instant proceeding was commenced in April 1972 by petition and an order of the District Court directing the Commission and SIPC to show cause ". . . why the remedies afforded by the Act should not be made available in this proceeding." A copy of that order was mailed to SIPC at its offices in Washington, D. C. The Receiver alleged no basis for the District Court's jurisdiction except one intended to support *in personam* jurisdiction over SIPC[8] which had not been a party to the Commission's action or the receivership. SIPC and the Commission served answers to the Receiver's Petition.

---

7. The Receiver admits his awareness of the Act "shortly after his appointment" four months earlier. His order of appointment directed him to recommend to the Court ". . . appropriate steps to be taken to protect . . . creditors and other persons dealing with" Guaranty Bond and its Parent.

8. The Petition alleged: "SIPC is subject to the jurisdiction of this Court because it is engaged in business in the Middle District of Tennessee in that it collects assessments under the Act from broker-dealers operating in this District."

*Receiver's Petition.* The Receiver alleged generally that Guaranty Bond transacted a securities business until January 6, 1971, and that its customers were "entitled to the protection of the Act". He acknowledged, however, that customers had received their bonds and credit balances and that their losses (if any) would result from a court-ordered deposit by customers equal to five percent of the principal amount of their bonds in order to defray part of the receivership expenses. A portion of that deposit has since been refunded.

*SIPC's Answer.* SIPC denied that Guaranty Bond transacted business until January 6, 1971 or that its customers were in need of the Act's protection. It also alleged seven affirmative defenses which, in substance, denied that the petition stated a claim upon which relief could be granted; challenged the District Court's jurisdiction over SIPC; denied that the Act applied to Guaranty Bond, as a result of the Commission's action and the insolvency and Net Capital Rule violations before the Act's Effective Date;[9] and further alleged that SIPC's refusal to intervene under the circumstances of the receivership was either required by the Act or was a proper exercise of its discretion.

**District Court's Opinion**

The District Court rendered its decision solely on the basis of the pleadings. It first held that the exercise of *in personam* jurisdiction over SIPC was consistent with due process of law [citing *International Shoe Co.* v. *State of Washington*, 326 U.S. 310 (1945) and *McGee* v. *International Life Insurance Co.*, 355 U.S. 220 (1957)] and the single-act Tennessee long-arm statute (TENN. CODE ANN.

9. The Commission's answer stated the view that the Act should be applied to Guaranty Bond it it transacted business after the Act's Effective Date. However it also stated, in substance, that SIPC's intervention would be needed only if customers actually sustained losses, which had not been demonstrated since the Receiver might have causes of action against Guaranty Bond's principals which would benefit customers.

§ 20-235). Based solely on the Act's provisions the Court reasoned that "the execution of these statutory activities [protection of customers and receipt of assessments] anticipates a continuing relationship between SIPC and its members and customers" in Tennessee. The District Court also sustained its subject matter jurisdiction and the Receiver's standing to maintain this "enforcement action" stating, in part, that ". . . the default or neglect of the Commission to institute enforcement proceedings under § 7(b) should give rise to a similar cause of action by a receiver in behalf of a member's customers."[10] However, the Court dismissed the Receiver's proceeding on the ground that the Act was not intended to apply to broker-dealers such as Guaranty Bond who were hopelessly insolvent or in substantial violation of the Net Capital Rule before the Act's Effective Date.

**Court of Appeals' Opinion**

The Court of Appeals sustained *in personam* jurisdiction over SIPC on the opinion of the District Court. It also inferred from the Act that customers of a Member have a right to bring an "enforcement action" against SIPC. It did so by a process of construction based solely on "the lack of express language of exclusivity in providing for an enforcement action by the S.E.C., coupled with a general provision allowing for suits against the S.I.P.C." The Court cited no supporting legislative history or rule of construction. No other Court of Appeals has decided this point but a contrary result was reached in *Bohart-McCaslin Ventures, Inc.* v. *Midwestern Securities Corp.*, 352 F. Supp. 937 (N.D. Tex. 1973).

The Court further held that the Receiver has standing to maintain an "enforcement action" in light of (i) the aforesaid "lack of express language of exclusivity" and (ii) its conclusion that the Receiver meets the tests enunciated in

10. There was no proof of default or neglect by the Commission.

*Sierra Club* v. *Morton*, 405 U.S. 727 (1971), and *Association of Data Processing Service Organizations, Inc.* v. *Camp*, 397 U.S. 150 (1970).

The Court of Appeals reversed the District Court and held that despite its financial collapse in 1970 the Act applied to Guaranty Bond because it was allegedly ". . . in fact, a broker or dealer at the effective date of the Act." This conclusion was premised on a statement by the District Court that Guaranty Bond "handled 101 transactions" in 1971 before it was enjoined on January 6th. Whether it did was denied by SIPC and has not been established by evidence in this proceeding.

The Court of Appeals remanded "for proceedings consistent with this opinion and specifically to determine and enforce any rights of Guaranty's customers under the S.I.P.A." It did not specify how the Act should be implemented, but its mandate must be viewed as a summary rejection of SIPC's affirmative defenses and arguments based upon the impossibilty of applying the Act in this case as the Act provides and as Congress intended. The District Court did not reach that question.

## Summary of the Act

The Act has not yet been reviewed by this Court.[11] An understanding of the purposes and general operation of the Act is essential to an appreciation of the issues and their importance which leads SIPC to seek this Court's consideration.

The securities industry encountered serious financial difficulties in the late 1960's. Public investor confidence waned. To bolster that confidence Congress adopted the Act which created a new federal program with these purposes:

11. Petitions for certiorari by parties other than SIPC were denied in *Allan F. Hughes, Inc.* v. *Securities & Exchange Commission*, 414 U.S. 1092 (1973), and *Seligsohn* v. *Securities & Exchange Commission*, 414 U.S. 1111 (1973).

> ". . . to protect individual investors from financial hardship; to insulate the economy from the disruption which can follow the failure of major financial institutions; and to achieve a general upgrading of financial responsibility requirements of brokers and dealers to eliminate, to the maximum extent possible, the risks which lead to customer loss."[12]

The Act accomplished these purposes essentially by two methods. First, it enhanced the Commission's powers to establish financial responsibility rules for broker-dealers[13] and to impose on the self-regulatory organizations[14] requirements for the financial examination of their members.[15] As the Court knows the securities industry is self-regulated, subject to the Commission's rulemaking and enforcement powers. Second, it created SIPC which it empowered to commence proceedings for the liquidation of its members whose financial condition poses the threat of loss to their customers ("Liquidation Proceeding"). Congress placed responsibility for its new program on the Commission, SIPC and the industry's self-regulatory organizations.

SIPC is not an insurance company. It was conceived[16] and created as a private, non-profit, industry-funded mem-

12. S.REP. No. 91-1218, 91st Cong., 2d Sess. 4 (1970) ("Senate Report"), see also H.R.REP. No. 91-1613, 91st Cong., 2d Sess. 1 (1970) ("House Report").

13. Section 7(d), 15 U.S.C. § 78ggg(d). Citations to the Act as reported in the United States Code will not repeat 15 U.S.C.

14. Defined in Section 12(1), § 78*lll*(1), "self-regulatory organizations" currently consist of national securities exchanges and the National Association of Securities Dealers, Inc.

15. Section 9(f), § 78iii(f). Similarly SIPC is given responsibility to work with the self-regulatory organizations toward the standardization of their examining procedures and the development of procedures for the early detection of approaching financial difficulty of SIPC members. Section 9(e), § 78iii(e).

16. Hearings on S. 2348, S. 3988, S. 3989 Before the Subcomm. on Securities of the Senate Comm. on Banking and Currency, 91st Cong., 2d Sess., 231-233, 271-272 (1970). Hearings on H.R. 13308, H.R. 17585, H.R. 18081, H.R. 18109, H.R. 18458 Before the Subcomm. on Commerce and Finance of the House Comm. on Interstate and Foreign Commerce, 91st Cong., 2d Sess., 199 *et seq.*, 365

bership corporation[17] which would work within the self-regulatory structure. Its Board consists of five persons appointed by the President and confirmed by the Senate, and two designated respectively by the Federal Reserve Board and the Secretary of the Treasury.[18] As earlier noted most broker-dealers are required to be SIPC members and to pay assessments to SIPC.[19] If SIPC's funds should be inadequate to carry out its purposes the Act authorizes a loan of up to one billion dollars from the United States Treasury.

Prompted in part by the availability of United States funds,[20] the Congress granted the Commission extensive supervisory power over SIPC. Those powers include approval of SIPC's bylaws and rules, certain financial decisions involving SIPC's credit and funds, and effective control over matters relating to the borrowing and repayment of United States funds.[21] Additionally the Commission is empowered to adopt rules adjusting certain provisions of the Act relating to the protection of customers, and to determine the Act's applicability to the foreign operations of SIPC members.[22] SIPC is required to make annual reports of its operations to the Commission which the Commission is obliged to transmit to the President and the Congress with such comments as it deems appropriate.[23]

SIPC's authority to commence a Liquidation Proceeding for the protection of customers is an important segment of

---

(1970). These hearings will hereinafter be cited as "Senate Hearings" and "House Hearings." See also House Report at 11-13.

17. Sections 3(a) and 4, §§ 78ccc(a) and 78ddd.

18. Section 3(c), § 78ccc(c).

19. Sections 3(a)(2) and 4(c), §§ 78ccc(a)(2) and 78ddd(c).

20. Senate Hearings at 243; House Hearings at 219-220, 345.

21. Sections 3(e)(2)-(3), 4(d)(2)(B), 4(e)(1) and 4(f)-(g); §§ 78ccc(e)(2)-(3), 78ddd(d)(2)(B), 78ddd(e)(1), and 78ddd (f)-(g).

22. Sections 6(c)(2)(C)(iii), 6(d)(1) and (2), and 11(b); §§ 78fff(c)(2)(C)(iii), 78fff(d)(1) and (2), and 78kkk(b).

23. Section 7(c)(2), § 78ggg(c)(2).

the Act's program.[24] This potent responsibility also has aspects of enforcement. Thus, the Act authorizes liquidation of a SIPC Member which is not in compliance with applicable requirements under the Securities Exchange Act of 1934, or rules of the Commission or a self-regulatory organization, with respect to financial responsibility or hypothecation of customer's securities.[25] It is even permitted if a Member cannot make the computations necessary to establish such compliance.[26] If these or other specified conditions exist (*e.g.*, insolvency),[27] and if SIPC determines that a Member "has failed or is in danger of failing to meet its obligations to its customers," SIPC "may" commence a Liquidation Proceeding.[28] Whether it does depends upon its exercise of the broad discretion granted it.[29] At this writing 105 SIPC Members have been placed in liquidation under the Act and their customers have been protected.

SIPC has no authority to examine its Members. It depends for its information on the self-regulatory organizations and the Commission. The Act requires them to notify SIPC immediately when they believe that any broker-dealer subject to their regulation is in, or is approaching, financial difficulty.[30] Because violations of the federal securities laws are invariably involved, in most cases SIPC commences its proceeding simultaneously with, or immediately after, an injunction action commenced by the Commission against the Member. The Act permits SIPC to combine its Liquidation Proceeding with any action brought by the Commission, and

24. House Hearings at 219-220.

25. Sections 5(a)(2), 5(b)(1)(A); §§ 78eee(a)(2), 78eee(b)(1)(A).

26. *Id.*

27. *Id.*

28. Note 25, *supra.*

29. Senate Report at 11; House Hearings at 200, 236-237, 331-333; 340-341; Senate Hearings at 259-260.

30. Section 5(a)(1), § 78eee(a)(1).

it also authorizes the Commission to appear and participate as a party in a Liquidation Proceeding.[31]

SIPS does not itself liquidate its members. It is merely authorized to commence a Liquidation Proceeding in the appropriate federal district court. The Member involved is entitled to contest SIPC's allegations.[32] Where the Member consents or SIPC prevails, the court is required to appoint persons designated by SIPC to serve as trustee and counsel[33] to carry out the purposes of the Liquidation Proceeding which is governed by the Act and certain provisions of the Bankruptcy Act.[34] A Liquidation Proceeding is exceedingly complex.[35] In the course thereof SIPC's funds provide limited protection to the Member's customers (discussed *infra*, p. 21).

## Reasons for Granting the Writ

### I.

**The Proper Construction of Section 7(b) of the Act is an Important Novel Federal Question Which Should be Settled by this Court and Which the Court of Appeals Decided in a Way in Conflict With Controlling Principles Established by Decisions of this Court.**[36]

#### A. Section 7(b) is Critically Important to the Proper Implementation of the Act, to the Securities Industry, and to the Commission's Responsibility to Enforce the Federal Securities Laws.

There is only one means whereby SIPC's funds may be used to protect the investing public, namely, a Liquidation

31. Sections 5(a)(3)(A), 5(c); §§ 78eee(a)(3)(A), 78eee(c).

32. Section 5(b)(1)(B); § 78eee(b)(1)(B).

33. Section 5(b)(3); § 78eee(b)(3).

34. Section 6(c)(1); § 78fff(c)(1).

35. Duffy, "Reforming SIPC," 7 THE REV. OF SEC. LEG. 985, 990 (1974).

36. A further consideration is the conflict between the decision below and *Bohart-McCaslin Ventures, Inc.* v. *Midwestern Securities Corp.*, 352 F.Supp. 937, 940 (N.D. Tex. 1973). See *United States* v. *Constantine*, 296 U.S. 287, 290-291 (1935).

Proceeding commenced by SIPC. By enacting Section 7(b) the Congress granted the Commission the extraordinary discretionary right to bring a mandatory injunction action to require SIPC to commence a Liquidation Proceeding, notwithstanding the contrary exercise of SIPC's judgment. That right is extraordinary for two reasons. First, it permits judicial review of a discretionary corporate decision. Second, it entitles a party to compel the commencement of a legal proceeding by another. That enforcement action is a powerful supervisory instrument which the Congress entrusted to the Commission's expertise, discretion and sense of public responsibility. Section 7(b) is a consistent extension of the Commission's supervisory role over SIPC in other important matters.

The decision to commence a Liquidation Proceeding frequently involves sophisticated judgments upon complex financial facts and applicable rules and regulations. SIPC necessarily makes such determinations in close cooperation with the Commission and the self-regulatory organizations. In many cases it is immediately clear that a Liquidation Proceeding is necessary. In many others forebearance allows time for other viable solutions such as the infusion of new capital, the transfer of accounts to a healthy firm, or the self-liquidation, merger or acquisition of the troubled firm. Despite the existence of bases upon which a Liquidation Proceeding could be commenced such solutions, not uncommon in this troubled economy, are decidedly in the public interest and are encouraged by the self-regulatory organizations, the Commission and SIPC.

To infer that the investing public possesses an enforcement right parallel to the Commission's, where the Commission in its discretion does not sue SIPC, would add another extraordinary layer of supervision of even broader scope. Did Congress intend *sub silentio* to give the general public the right to substitute its judgment for SIPC's *and* the Commission's, and to obtain judicial review of the impor-

tant and delicate determinations which the Congress specifically entrusted to them alone? Did Congress intend *sub silentio* to vest the general public with the unique right to compel a corporation to commence a judicial proceeding, particularly one with the impact of a Liquidation Proceeding, or to compel the commitment of funds of SIPC and the United States despite contrary determinations by SIPC and the Commission? Recognition of such rights is inconsistent with the clear design of the Act, and further would open the door to other serious adverse consequences.

It is, of course, impossible to measure the impact of an implied private right of enforcement in terms of the number of actions which might be commenced. Much would depend upon the state of the economy. But should the door be opened at all to private actions which (i) could frustrate the viable alternatives to a Liquidation Proceeding mentioned above; (ii) could be enough, by reason alone of the allegations made, to start a fatal run on a firm in a fragile but not terminal financial condition; (iii) might very well interfere with the Commission's investigative or enforcement activities in a given case; (iv) could be commenced on grounds other than those for involuntary petitions under the Bankruptcy Act; (v) could be commenced by a bad faith customer, including a competitor of the subject firm; (vi) might compel a firm, perhaps in marginal financial circumstances, to devote resources to a defense or at least a burdensome involvement in the action against SIPC; and (vii) could take the form of a class action with all its attendant difficulties? Recognition of a private right of action is pregnant with far more hazards, not susceptible of precise forecasting, than any benefit likely to result.

The decision of the Court of Appeals, if allowed to stand and if followed by other Courts, paves the way for incalculable damage to the orderly plan of the Act, members of

the securities industry, and even the enforcement activities of the Commission. It presents a question which is appropriate for review by this Court.

### B. The Court of Appeals Seriously Misconstrued Section 7(b) by Failing to Apply Principles of Construction Firmly Established by this Court.

Because Congress did not add words of exclusivity to Section 7(b), the Court of Appeals inferred a congressional intent to imply a private enforcement action from SIPC's right, included among SIPC's enumerated general powers, to sue and be sued, complain and defend, in its own name and through its own counsel in any federal or state court.[37] In so holding the Court of Appeals failed to follow the clearly applicable rule of construction *expressio unius est exclusio alterius* and the well-settled principle of exclusivity where a federal statute protects a public right by granting a specific remedy to an independent agency of the federal government. *Nat'l R.R. Passenger Corp.* v. *Nat'l Ass'n of R.R. Passengers,* 414 U.S. 453 (1974); *Switchmen's Union of North America* v. *Nat'l Mediation Board,* 320 U.S. 297 (1943); *Botany Worsted Mills* v. *United States,* 278 U.S. 282, 289 (1929); *Holloway* v. *Bristol-Myers Corp.,* 485 F.2d 986 (D.C. Cir. 1973); *Ash* v. *Cort,* 496 F.2d 416 (3d Cir. 1974) (dictum), *petition for cert. filed,* 42 U.S.L.W. 3703 (U.S. June 20, 1974) (73-1908).[38] The Court of Appeals also failed to apply the equally well-settled rule that a statutory provision which deals specifically with a matter will not be enlarged by reason of a gen-

37. Section 3(b)(1), § 78ccc(b)(1).

38. See also *Bass Anglers Sportsman's Soc.* v. *U.S. Steel Corp.,* 324 F.Supp. 412, 415 (S.D., M.D. & N.D. Ala.), *aff'd,* 447 F.2d 1304 (5th Cir. 1971); *Jacklovich* v. *Interlake, Inc.,* 458 F.2d 923 (7th Cir. 1972); *Connecticut Action Now, Inc.* v. *Roberts Plating Co., Inc.,* 457 F.2d 81 (2d Cir. 1972); *Bass Anglers Sportsman's Soc.* v. *U.S. Plywood-Champion Papers, Inc.,* 324 F. Supp. 302 (S.D. Tex. 1971).

eral provision in the same statute. *Continental Cas. Co.* v. *United States*, 314 U.S. 527, 533 (1942); *Ginsberg & Sons* v. *Popkin*, 285 U.S. 204, 208 (1932).[39] Of the numerous applicable precedents it seems necessary only to discuss this Court's decision in the *Nat'l R.R. Passenger Corp.* case, *supra* (the "Amtrak" case) which, especially in light of its facts, seems controlling.

In *Amtrak* this Court reviewed Section 307(a) of the Amtrak Act which authorizes the federal district courts, upon petition of the Attorney General, to restrain violations of duty by Amtrak in its administration of the Amtrak Act. Section 307(a) uses no words of exclusivity. Amtrak was made subject to the District of Columbia Business Corporation Act,[40] Section 29-904(b) of which makes Amtrak generally amenable to suit. Nevertheless, this Court refused to infer a private right of action to restrain Amtrak's violation of its very broad statutory responsibilities. Viewing Section 307(a) as creating "a public cause of action" maintainable by the Attorney General, this Court held that the maxim *expressio unius est exclusio alterius* required the conclusion that the Attorney General's remedy is exclusive in the absence of "clear contrary evidence of legislative intent." In reaching its determination this Court noted with some emphasis that to infer a private right of action would produce results inconsonant with Congress' plan to provide an "efficient apparatus" to carry out the purposes of the Amtrak Act.[41] It also noted (at

39. See also *United States* v. *Giordano*, 469 F.2d 522, 529 (4th Cir. 1972), *aff'd*, 94 S.Ct. 1820 (1974); *Massachusetts Trustees of Eastern Gas & Fuel Associates* v. *United States*, 312 F.2d 214, 220 (1st Cir. 1963); *Service Life Insurance Company* v. *United States*, 293 F.2d 72, 76, 77 (8th Cir. 1961); *SEC* v. *Long Island Lighting Co.*, 148 F.2d 252 (2d Cir. 1945).

40. 45 U.S.C. § 541.

41. Referring to the line of cases which have inferred a private right of action [citing *J. I. Case* v. *Borak*, 377 U. S. 426 (1964)], this Court emphasized that a private right could not be inferred unless ". . . consistent with the evident legislative intent and . . . the effectuation of the purposes intended to be served by the Act." (at 457-458).

464 n. 12) Amtrak's statutory duty to make periodic reports of its operations to the Congress and the President, a factor which it thought enabled Congress to believe that the exclusive remedy given the Attorney General would be effective.

The *Amtrak* rational would seem *a fortiori* to require a reversal in this case. The Act vests the exclusive enforcement right in a government agency upon which Congress conferred other important supervisory powers over SIPC. In further contrast to the Attorney General's less proximate involvement with Amtrak's operations, the Commission by reason of its enforcement activities is preforce privy to every situation in which SIPC might have a responsibility. Indeed, the Commission is obliged to notify SIPC of the possible failure of a broker-dealer, and the self-regulatory organizations must make such reports to the Commission as well as SIPC.[42] Unlike Amtrak, SIPC is a nonprofit corporation whose duty to the public cannot be affected by a profit motive. Like Amtrak, SIPC's annual reports of its operations are transmitted to the President and to Congress. Indeed they are accompanied by the Commission's comments. SIPC's board of seven includes two representatives of the federal government whereas Amtrak's board of seventeen includes only one. Like the Amtrak Act, express words of exclusivity do not appear in Section 7(b) and SIPC is generally amenable to suit. And finally, it is clear that recognition of a private enforcement action would be inconsistent with the scheme and purposes of the Act. It should be observed that even the reasons given by Mr. Justice Douglas in his dissent in *Amtrak* appear inapplicable to the Act, and that the grounds upon which he distinguished the *Switchmen's Union of North America* case, *supra*, do not obtain here.

To the foregoing may be added these comments. Section 7(b) is entitled "Enforcement of Actions" and Section 7

42. Section 5(a)(1), § 78eee(a)(1).

itself is entitled "SEC FUNCTIONS". Although not controlling, these titles tend to support the conclusion of exclusivity. In addition, Section 7(b) requires the Commission to sue in the District Court where SIPC's principal office is located, a requirement that could require suit in Los Angeles if SIPC thought it appropriate to locate there. Designed for SIPC's convenience, this provision tends to negate a congressional intent to imply a private right of action which might be brought anywhere if jurisdictional bases existed. There is no legislative history which would require the applicable rules of construction to yield. Examination of the congressional hearings, reports and floor remarks fails to reveal any specific comments on the exclusivity of Section 7(b) or any counterpart in predecessor bills.[43] What can be gleaned, as noted earlier, is a Congressional insistence on substantial Commission supervision over SIPC.

The Court of Appeals clearly erred when it inferred a private right of action from a provision which at most makes SIPC amenable to suit but does not purport to

43. The following portions of legislative history support exclusivity. First, the House Report stated (at 22): "Section 7(b) of the bill provides that, should SIPC refuse to commit its funds or otherwise act for the protection of customers of any member, the Commission could apply to a court for an order requiring SIPC to discharge its obligations under this legislation or for such other relief as the court may deem appropriate to carry out the purposes of the legislation—for example, requiring SIPC to file an application under section 5."

Second, the Senate Report stated (at 15): *"Section 35(p)* [Senate counterpart of Section 7(b)] accords the Commission the power to apply to a District Court for an order in the nature of a mandatory injunction in the unlikely event that the Corporation refuses to carry out its duties."

Third, the Act evolved from a bill prepared jointly by the Commission and representatives of the securities industry. Each had previously submitted separate bills. The bill submitted by the industry contained no provision for an enforcement action by the Commission or anyone (House Hearings at 57). The Commission's bill provided for enforcement by the Commission in a section which also granted the Commission the power to approve SIPC's bylaws (House Hearings at 35, 53).

establish any substantive rights which might be asserted against it. The lack of words of exclusivity in Section 7(b) was erroneously regarded as a sufficient indicator of a private right of action. The decision below is in direct conflict with the *Amtrak* case and numerous other applicable precedents. It should be reversed. The holding in *Bohart-McCaslin Ventures, Inc.* v. *Midwestern Corp.*, 352 F.Supp. 937 (N.D. Tex. 1973) was correct.

## II.

**The Court of Appeals' Summary Rejection of SIPC's Defenses Based Upon the Impossibility of Fulfilling the Act's Purposes as a Result of the Receivership Raises Questions of Critical Importance to SIPC's Authority and the Proper Implementation of the Act.**

The Court of Appeals directed the District Court "to determine and enforce any rights of Guaranty's customers under the S.I.P.A." (Appendix-10).[44] Under the circumstances that determination amounts to making SIPC a mere indemnitor of the customers' share of the Receiver's fee and expenses. The Court's action constituted a summary dismissal, without benefit of proof, of SIPC's two affirmative defenses based on the substantially completed status of the receivership and the resulting impossibility of implementating the Act even substantially as Congress intended.[45] That determination substitutes the judicial apparatus and discretion for the plain design of the Act and SIPC's discretion and role thereunder. Whatever may be the appeal of such a pragmatic result, it raises fundamental questions of vital importance to the administration of the Act.

---

44. The Court of Appeals discussed only the threshold question of the Act's applicability (Question 5, *supra* at 3) which this petition reserves (n. 3 *supra*).

45. The first defense alleged that under the circumstances SIPC lacked authority under the Act to take any action thereunder. The second alleged that SIPC's refusal to take action was a proper exercise of its corporate discretion which should not be superseded by judicial action.

The Act provides for ". . . the prompt and orderly liquidation of SIPC members when required."[46] Section 6 contains detailed procedural and substantive provisions which determine the rights of customers and SIPC. Some are summarized below[47] but there are many others (Appendix D-9 *et seq.*). As that summary shows, the Act does not attempt to make all customers whole. It established a plan of limited protection via a carefully delineated liquidation proceeding. It contemplates that customers' claims will be satisfied to the maximum extent possible from the assets already on hand with the Member. SIPC's funds merely supplement those assets within the limits and in the manner provided by the Act. The scope of customer protection and SIPC's exposure depend upon adherence to the statutory scheme which includes correct identification of protected customers, the proper determination of their net equities, the valuation of their securities as of the "filing date" regardless of subsequent changes in value, the prorata distribution of securities when required, the enforcement of SIPC's rights of recoupment and subrogation, the avoidance of preferential transfers and the vigorous

46. House Report at 9; see also Senate Hearings at 303.

47. The term "customer" is defined in great detail [Section 6(c)(2)(A)(ii); §78fff(c)(2)(A)(ii)]. Such customers are entitled to the return of their specifically identifiable property, as defined [Sections 6(c)(2)(C), 6(c)(2)(A)(i); §§78fff(c)(2)(C), §§78fff(c)(2)(A)(i)]. All customers' property (except specifically identifiable property) constitutes a single and separate fund (the "Fund") for the benefit of customers [Section 6(c)(2)(B); §78fff(c)(2)(B)]. Customers are entitled to share prorata in the Fund, based on the value of the "net equity" of their accounts (excluding specifically identifiable property) as of the "filing date" [Sections 6(c)(2)(A)(iv), 5(b)(4)(B); §§78fff(c)(2)(A)(iv), 78eee(b)(4)(B)]. If the Fund is insufficient to satisfy all customers' net equities the balance of their claims share in the general estate with general creditors [Section 6(c)(2)(B); §78fff(c)(2)(B)]. Customers are protected by SIPC's funds only to the extent their net equities cannot be satisfied from the "Fund" and the general estate, and then only up to $50,000 per customer of which only $20,000 is available for cash claims [Section 6(f)(1); §78fff(f)(1)]. In determining the unsatisfied amount of net equities,

pursuit of recoveries against a Member's principals and employees as well as third parties.

In short, Congress established a definitive method through which it authorized and limited the protection of customers as well as the use, for that purpose, of funds of SIPC and the United States Treasury. In doing so it specifically granted SIPC the discretion to determine when those funds should be committed, subject to a possible enforcement action by the Commission. The decision of the Court of Appeals substantially defeats the manifest intent of Congress. It violates the fundamental principle that legislation may not be made to operate in a manner substantially different than prescribed by Congress [*United States* v. *Sisson*, 399 U.S. 267, 298 (1970); *Perry* v. *Commerce Loan Co.*, 383 U.S. 392, 400 (1966)] as well as the most rudimentary principles limiting judicial review of corporate action.

SIPC's defenses involve more than allegations. They are predicated upon the District Court's record of the receivership, including that Court's orders, which may be judicially noticed. See *Landy* v. *Federal Deposit Insurance Corporation*, 486 F.2d 139, 151 (3d Cir. 1973), *cert. denied*, 94 S. Ct. 1979 (1974). Moreover, there is no serious dispute that those defenses arose from a situation which SIPC was unable to alter or prevent. Neither the receiver nor the Commission has countered SIPC's documented allegation that it had no notice or knowledge of the Guaranty Bond

---

securities returned in partial satisfaction of securities claims are valued as of the "filing date" regardless of actual value at time of distribution [Section 6(c)(2)(B); §78fff(c)(2)(B)]. Certain customers (specified insiders of the Member, banks and broker-dealers) are entirely excluded from SIPC protection [Sections 6(f)(1)(C) & (D); §§78fff(f)(1)(C) & (D)]. SIPC's funds are intended only to augment the Member's estate within prescribed limits. Thus SIPC's advance of funds to customers subrogates it to their rights against the Fund and the general estate [Section 6(f)(1); §78fff(f)(1)]. Although SIPC is authorized to advance funds for administrative expenses it enjoys a priority right of recoupment from the Member's estate [Sections 6(c)(2)(B), 6(f)(2); §§78fff(c)(2)(B), 78fff(f)(2)].

difficulties until the end of May, 1971. The action of the Court of Appeals in rejecting these defenses without discussion so thoroughly eviscerates the Act and SIPC's corporate role thereunder as to present a question of the utmost importance to the proper implementation of the Act.

The implications of the decision below reach beyond its effect as precedent. It is likely that the Court's error resulted from its desire to supply some sort of financial help to make Guaranty Bond's customers whole. That is a phenomenon which frequently occurs when a source of funds seems available to relieve persons of the burden of financial loss. It cannot be gainsaid that other courts, particularly in light of the decision below, may respond to the same sympathies and reach for solutions at considerable variance from the Act. The Act is new and unfamiliar to many lawyers and judges. It would be an understatement to say there are many misconceptions concerning the nature of the protection provided by the Act. Many mistakenly equate it with insurance. It is respectfully submitted that this case, even recognizing its unusual factual characteristics, offers a vehicle which could be utilized by this Court to make an appropriate helpful expression upon the purposes of the Act and the manner in which it is intended by Congress to work. The uncertainties created by the decision below on the fundamental questions of the scope of SIPC's discretion under the Act, the scope of judicial review and the proper implementation of the Act plainly carry the potential for serious disruption of the program expressed in the Act. Those questions should not be left unsettled.

## III.

**The Exercise of *In Personam* Jurisdiction Over SIPC Raises an Important Question of Due Process of Law Which the Court of Appeals Decided in a Way in Conflict With Controlling Decisions of this Court.**

The courts below sustained *in personam* jurisdiction over SIPC upon a novel theory.[48] There was no evidentiary hearing or proof by affidavit. On the basis of the Act alone, it was reasoned that a "relationship" existed between SIPC and Guaranty Bond's customers arising from the Act's general remedial purposes and its imposition of mandatory assessments upon Members as a funding device. That rationale conflicts with this Court's decisions in *International Shoe Co.* v. *State of Washington*, 326 U.S. 310 (1945), *McGee* v. *International Life Ins. Co.*, 355 U.S. 220 (1957), and *Hanson* v. *Denckla*, 357 U.S. 235 (1958).

The cited cases establish that *in personam* jurisdiction cannot constitutionally be exercised over a non-resident foreign corporation unless it has "minimum contacts" or "activities" in the forum state. The critical test enunciated in *International Shoe* was restated as follows in *Hanson* v. *Denckla* (at 253):

> "The application of that rule will vary with the quality and nature of the defendant's activity, but it is essential in each case that there be some act by which the defendant purpose fully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws."

*International Shoe* emphasized that whether due process is satisfied turns on qualitative rather than quantitative or mechanical evaluations of activity (at 319), and that the

48. Jurisdiction was based on the Tennessee long-arm statute. TENN. CODE ANN. § 20-235. As a result of a 1972 amendment, it permits the exercise of jurisdiction over non-residents ". . . as to any action or claim for relief arising from: . . . (f) Any basis not inconsistent with the Constitution of this state or of the United States."

required scope and quality of activity depends upon whether the liability asserted arises therefrom or is "unrelated" thereto (at 317-318). More substantial activity is required to establish sufficient "presence" in the forum state to support jurisdiction for a cause of action not arising from an act committed in the forum state (at 318). *Hanson* v. *Denckla* stressed that due process limitations not only guarantee immunity from distant litigation but "are a consequence of territorial limitations on the power of the repspective States" (at 251).[49]

There is no proof whatever that SIPC was engaged in any activities in Tennessee, substantial or otherwise, within the meaning of this Court's decisions. It is undisputed that SIPC's sole offices are located in Washington, D.C. SIPC is not a Tennessee corporation. Activity in Tennessee, in the sense of the cited cases, can hardly be deduced from the Act itself which places the collection of assessments primarily with the self-regulatory organizations whose office locations and collection procedures are clearly a matter of proof. The cause of action asserted by the Receiver obviously did not arise from the collection of assessments, nor did the Courts below so hold. Therefore jurisdiction could only be supported by proof of activity by SIPC in Tennessee, directly or through agents, which was so substantial as to establish a presence sufficient to render it generally amenable to sit in Tennessee.

The "relationship" to which the District Court referred, adopted by the Court of Appeals, can only be characterized as amorphous and inchoate. If such theories can be used to sustain *in personam* jurisdiction, then even the admitted elasticity of due process has no meaningful bounds. This Court's cautions against excesses in *Hanson*

49. In this connection the court observed that jurisdiction is not acquired because the forum is ". . . the 'center of gravity' of the controversy or the most convenient location for litigation." (at 254).

v. *Denckla* have gone unheeded by the Courts below whose rationale portends serious consequences for SIPC. By operation of the Act assessments are received from Members throughout the Nation. If the views below should stand, they are sufficiently potent to expose SIPC to suit in most federal district courts. Moreover, the abandonment in this case of the requirement of "presence", "activity" or "contact" with the forum carries broad implications for litigants generally. The decision below conflicts with this Court's decisions and basic due process. Review by this court would appear most appropriate.

## CONCLUSION

For the reasons set forth above, it is respectfully submitted that this petition for certiorari should be granted to review the opinion and judgment of the Court of Appeals.

Respectfully submitted,

THEODORE H. FOCHT
*General Counsel*
Securities Investor Protection Corporation
900 Seventeenth Street, N.W.
Suite 800
Washington, D.C. 20006
*Attorney for Petitioner*

*Of Counsel:*
WILFRED R. CARON
*Associate General Counsel*
KEVIN H. BELL